National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 21, 1993

Martin M. Arlook, Regional Director, Region 10

Robert E. Allen, Associate General Counsel, Division of Advice

Goody's Family Clothing, Inc. Case 10-CA-26718

220-2500, 220-2587-0100, 220-2587-2500, 518-2001, 518-2017-0100, 518-2017-2800, 518-8000, 625-4483-3300, 625-4483-1400

This case was submitted for advice on whether, under Electromation, Inc., 309 NLRB No. 163 (1992), the Employer violated Section 8(a)(2) by reformulating and maintaining a Safety Committee, composed of management and employee members, in response to a new State of Tennessee statute mandating the establishment of such safety committees.

FACTS

In about 1990, prior to the Union's organizing activities, the Employer established a Safety Committee, consisting of both management and employee members appointed by the Employer, at its warehouse and distribution center. The committee apparently met on a sporadic basis. The Union was certified in August 1992, following an election in January 1992, and contract negotiations began in October 1992. Little progress has been made in negotiations to date.

In January 1993, the Employer brought the Safety Committee members together and announced that it was revamping the Safety Committee to comply with a recently-enacted State of Tennessee law[(1)] which mandates that those employers in the State with poor safety records form safety committees composed of an equal number of employer and employee representatives.[(2)] With regard to the employee members, the law provides that, where a collective bargaining relationship exists, employee representatives "may be selected by their peers."[(3)] The law contains specific guidelines governing the operation of the committee, including its composition, when it must meet, what areas it must address, and how the employer must interact with it. It provides, inter alia, that the committee evaluate employee safety suggestions and make recommendations to the employer, and that the employer respond in writing within 30 days or less to committee recommendations.[(4)]

The newly formalized Safety Committee has been in operation since January 1993. The employee members of the Committee remained the same, but the Employer conducted a vote among them for an employee co-chairman of the Committee.[(5)] The Committee has formulated a number of safety recommendations which it has presented to the Employer. The Committee reviews suggestions submitted by unit employees to employee Committee members and proposals placed in suggestion boxes. The Committee has based some of its recommendations to the Employer on these suggestions and proposals. Committee recommendations made to the Employer, some of which the Employer has agreed to and some of which it has rejected, have included a request for padding around sharp edges on equipment, a request for brake blocks for motorized pallet jacks, servicing of fire extinguishers, replacement of worn electrical cords, better clearing of parking lots in bad weather, installation of an audible warning device on golf carts, and better lift truck training.

Upon learning in January 1993 of the existence of the revamped Safety Committee, the Union notified the Employer that it wanted to discuss the procedure for selection of employee representatives for the Committee, apparently because it wished to have unit employees vote for employee members of the Committee. The Employer, in response, has maintained a position that, until the parties reach final agreement on a contract, it will not implement any provisions concerning a contractually established safety committee. At the same time, the Employer maintains that its obligation to comply with the State law mandates that the Safety Committee continue to function as presently formulated.

Complaint has issued in several related cases, 10-CA-26240, 10-CA-26288, and 10-CA-26612, alleging a Section 8(a)(5) refusal to furnish information as well as a number of unilateral changes. In the instant case, the Region has decided that a Section 8(a)(1) and (5) complaint will issue alleging unilateral changes in the Safety Committee procedures and functions, bypassing of the Union and direct dealing with employees on a mandatory subject, and refusal to bargain over existing issues affecting working conditions unless and until a complete contract is reached. These Section 8(a)(5) issues are not submitted for advice, although the Employer apparently would also raise the State law as defense to those allegations.

ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(2) since the Safety Committee is a Section 2(5) labor organization and the Employer has dominated its formation and administration.

1. Section 2(5) Labor Organization Status and the

Section 8(a)(2) Allegation

The Board and the courts have generally taken an expansive view of what constitutes a labor organization under Section 2(5).[(6)] In Electromation, Inc., 309 No. 163 (1992), the Board found, slip op. at 5, that the three essential elements which must be present to support such a conclusion are: (1) that employees participate in the organization or committee; (2) that the committee exists for the purpose, in whole or in part, of "dealing with" the employer; and (3) that these dealings concern conditions of work or other statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment. A fourth element may include a showing that the employees are acting in a representational capacity. Section 2(5) defines a labor organization as including an "employee representation committee" (emphasis added). In Electromation,, the Board found an employee "committee" to be "representational" and thus found it unnecessary "to determine whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees." Id., slip op. at 5, fn. 20.

In NLRB v. Cabot Carbon Co., supra, the Supreme Court held that the term "dealing with" is not synonymous with the more limited term "bargaining with," but rather must be interpreted broadly. The "dealing with" requirement is satisfied by any consultations between an employer and a representative group of its employees that look toward the resolution of grievances or the improvement of terms and conditions of employment. Subsequent to Cabot Carbon, the Board has held the following to be labor organizations: an employee council which discussed with management proposals for employees' facilities and fringe benefits;[(7)] a personnel committee which mediated grievances and made recommendations to the employer on working conditions and grievances;[(8)] and an employee action committee which functioned to improve working conditions and served as a communication conduit between the employees and the employer.[(9)] In contrast, the Board has found the following not to be labor organizations because they were intended to perform a management function and not interact with management: employee teams which were designed to perform certain employer-related tasks;[(10)] and employee grievance committees which served to adjudicate or decide employee grievances without making recommendations or proposals to the employer.[(11)]

Most recently, in E.I. du Pont & Co.,[(12)] the Board explained that "dealing" involves a "bilateral mechanism," i.e., "a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."

In the instant case, we find that the Safety Committee meets all of the criteria for a Section 2(5) labor organization. Employees participate in the committee. The Committee exists to "deal with" the Employer; the Committee's mission is to consider and evaluate employee safety proposals and then to make recommendations concerning those proposals to the Employer, which responds to those proposals.[(13)] Safety, the subject of those proposals, is a mandatory subject.[(14)]

We note that in du Pont, the Board found that, although the employer violated the Act by creating and dealing with safety committees, its participation in "safety conferences" was not similarly unlawful because the conferences amounted to "brainstorming sessions where employees were encouraged to talk about their experiences with certain safety issues and to

develop ideas and suggestions" and did not have "the task of deciding on proposals for improved safety conditions."[15] In the instant case, however, the Safety Committee engaged in precisely the same types of activities as did the safety committees found unlawful in du Pont: the Committee members evaluated proposals and decided whether to reject the proposals or to recommend them to the Employer's management. The fact that some of the proposals came from the Employer's suggestion box does not warrant a contrary conclusion, because those proposals did not go directly to the Employer. The Committee handled those proposals in the same way in which it handled proposals presented by employees or Committee members: it evaluated the proposals and then decided whether to recommend them to the Employer.[16] Thus, there was a "bilateral mechanism" for dealings between the Employer and the Committee.

Moreover, while it is not clear to what extent, if any, employee committee members must serve in a representational capacity in order for the committee to constitute a 2(5) labor organization,[17] it is clear that the members of the Committee in the instant case serve in such a representational capacity. When the Committee was originally created, the employee members were told that they were to represent employees in their departments. After the Tennessee law took effect and the Employer reformulated the Committee, the Employer relied on the law, which, as noted above, states that the committee must have employee representatives who serve as spokespeople for the Employer's employees. There is no evidence that the Committee members have not continued to have the same representative responsibilities they previously had. For all of the above reasons, we conclude that the Safety Committee is a Section 2(5) labor organization.

Next, we concluded that the Employer has created and dominated the Committee in violation of Section 8(a)(2). [18]

In Electromation, the Board stated

... a labor organization that is the creation of management, whose structure and function are essentially determined by management ... and whose continued existence depends upon the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, actual domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function.[19]

Here, although the Employer created the Committee in 1990, outside the 10(b) period, the Employer revived and reformulated the Committee in January 1993. The Employer added additional Employer representatives, revamped the Committee's procedures, told the members that they would now act in conformity with the Tennessee law, provided space for the Committee's meetings, and paid the Committee members for the time spent in meetings. Furthermore, the Employer's refusal to accede to the Union's demands for bargaining over the procedures for the selection of employee members additionally demonstrates the Employer's unlawful control over the Committee.[20] The employer in du Pont similarly refused the union's offer to "work together" with the employer as to safety matters and unilaterally created the unlawful committees.[21]

For all the above reasons, we conclude that a Section 8(a)(2) complaint is warranted, absent settlement.

2. Preemption

We reject the Employer's defense to the Section 8(a)(2) and (5) allegations, that the Tennessee law requires it to deal with the Safety Committee concerning mandatory subjects of bargaining, because the state law is preempted by the NLRA.

In Brown v. Hotel Employees, 468 U.S. 491 (1984), the Court held that where a state regulation actually conflicts with the NLRA, i.e., where it either penalizes conduct protected by the Act or permits conduct prohibited by the Act, the federal law must prevail by operation of the Supremacy Clause of the Constitution. The Court distinguished cases where preemption had been based on the "primary jurisdiction" of the Board, which applied whenever conduct prohibited by a state was arguably protected or prohibited by the Act. See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). In "primary jurisdiction" cases, the Court had carved out an exception to preemption when unusually "deeply rooted" local interests were at stake, since "consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the states of their ability to retain jurisdiction over such matters."[22] In Brown, the Court found that no such exception could apply in cases of actual conflict between state and federal law because "[i]f the

state law regulates conduct that is actually protected by federal law . . . preemption follows not as a matter of protecting primary jurisdiction but as a matter of substantive right," and "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail."[(23)]

The Tennessee law at issue here directly conflicts with Section 8(a)(2) and (5) of the NLRA. It requires that employers set up safety committees which clearly are "labor organizations" under Section 2(5) of the Act, i.e., they must have employee members and they must "deal with" employers regarding safety issues, which are conditions of employment. Further, the Tennessee law requires that the committees be set up in such a way that they are inevitably dominated by employers within the meaning of Section 8(a)(2) - i.e., employers create the committees, determine their structure and procedures, set their agendas in accordance with the law, pay employees to attend meetings, and even determine which employees will serve on the committees.[(24)] It also requires employers to "deal directly" with their employees serving on the committees, as this concept has been defined under Section 8(a)(5), in derogation of the exclusive representative status of elected collective bargaining representatives. Since the Tennessee law actually conflicts with federal prohibitions under Sections 8(a)(2) and (5) and, indeed, directly undermines the Congressionally-recognized policies supporting these prohibitions,[(25)] it is preempted under Brown, and there is no need to engage in a Garmon balancing of state and local interests.

This case is distinguishable from Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985), where the Court found that a state statute requiring that minimum levels of mental health care coverage be provided by employee health care plans was not preempted by the NLRA.[(26)] That case did not involve a direct conflict between state and federal law. Rather, the state had passed a law mandating a minimum term and condition of employment, which allegedly was preempted under the Machinists[(27)] doctrine prohibiting state regulation in areas Congress intended to remain unregulated. The Court rejected this argument, finding that Congress had been interested neither in regulating substantive terms and conditions of employment nor in leaving them unregulated; indeed, they had long been regulated by the states. Rather, Congress had been concerned only with implementing a collective bargaining "process" to create more equitable private bargaining and remedy the inequality of economic power then existing in favor of employers. Metropolitan Life Insurance Co., 471 U.S. at 752-758. Setting minimum substantive terms did not encourage or discourage the collective bargaining "processes" that were the subject of the Act. Thus,

[n]o incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with [the] general goals of the NLRA.

471 U.S. at 754-755. Here, on the other hand, the Tennessee law directly interferes with the collective-bargaining process established under the NLRA, conflicts with the clear meaning and purpose of Section 8(a)(2) and (5), and is incompatible with the goals of the NLRA.

Accordingly, the Employer may not rely on the state statute to unilaterally revamp and control the Safety Committee, or as a basis for "dealing with" the Committee at all as to mandatory subjects such as safety.[(28)]

3. Remedy

We conclude that a disestablishment remedy should be sought. This case is not distinguishable from the well-established line of Section 8(a)(2) domination cases which provide for such a remedy,[(29)] and it would be contrary to the public interest not to pursue a disestablishment remedy. As the Board stated in Electromation, "Much of the harm implicit in employer-dominated organizations is that, when they are successful, they appear to employees to be the result of an exercise of statutory freedoms, when in fact they are coercive by their very nature."[(30)] Such a remedy is appropriate even where, as here and in du Pont, the employees are represented by an independent, unassisted labor organization.

In summary, complaint is warranted, absent settlement, alleging that the Employer violated Section 8(a)(2) by recreating and dominating the Safety Committee, a Section 2(5) labor organization. The state statute upon which the Employer bases its defense is preempted by the Act. Finally, the appropriate remedy to be sought is disestablishment of the Committee.

R.E.A.

[1] Tennessee Code Annotated, Section 50-6-501, et seq.

[2] The rules accompanying the statute define an employee representative as "a non-managerial employee selected from employees who serves as their spokesperson." Rule 0800 -2-3-01(4).

[3] Rule 0800-2-3-.06(1)(a).

[4] Rule 0800-2-3-.08.

[5] The state statute requires that each Safety Committee have two co-chairs, one selected by the employer and one selected by employee members of the committee. Rule 0800-2-3-.06(1)(b)3.

[6] NLRB v. Cabot Carbon Co., 260 U.S. 203 (1959); Ona Corporation, a Division of Onan Corporation, 285 NLRB 400 (1987); American Tara Corporation, 242 NLRB 1230, 1241 (1979).

[7] St. Vincent's Hospital, 244 NLRB 84, 86 (1979).

[8] Predicasts, Inc., 270 NLRB 1117, 1122 (1984).

[9] Ona Corporation, supra.

[10] General Foods Corporation, 231 NLRB 1232 (1977).

[11] Mercy-Memorial Hospital Corporation, 231 NLRB 1108 (1977); Sparks Nuggett, Inc. d/b/a John Ascuaga's Nuggett, 230 NLRB 275 (1977).

[12] 311 NLRB No. 88, slip op. at 2 (May 28, 1993).

[13] See, e.g., Ona Corp., 285 NLRB 400, 405)1987) (employee action committee made proposals regarding vacations and floating holiday schedules); St. Vincent's Hospital, 244 NLRB 84, 85-86 (2979) (employee committee made proposals on several issues including wages, hours and vacations); Ampex Corp., 168 NLRB 742, 746-47 (1967), enfd. 442 F.2d 82 (7th Cir. 1971), cert. denied 404 U.S. 939 (1971) (committee presented suggestions to the employer on behalf of all employees as to subjects pertaining to working conditions).

[14] Du Pont, supra, slip op. at 4. In Salt Lake Division, Waste Management of Utah, 310 NLRB No. 149, slip op. at 1 (March 29, 1993), the Board stated that safety "might under other circumstances" be a subject that would place a committee "outside the ambit of Section 8(a)(2)." However, the Board nonetheless held that the employer violated Section 8(a)(2) in establishing and dealing with a committee that addressed, inter alia, safety concerns. Thus, the Board's comment about "other circumstances" is dictum, outweighed by the Board's subsequent decision in du Pont that the employer's creation and domination of safety committees violated Section 8(a)(2).

[15] Du Pont, 311 NLRB No. 88, slip op. at 4.

[16] Compare du Pont, 311 NLRB No. 88, slip op. at 2 ("[U]nder a 'suggestion box' procedure where employees make specific proposals to management, there is not dealing because the proposals are made individually and not as a group") (footnote omitted).

[17] See Electromation, 309 NLRB No. 163, slip op. at 5 fn. 20 (Board found it unnecessary to determine "whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees"). Member Devaney, in his concurring opinion, looks to the committee's authority, that is, whether it has been empowered by the employer or the employees to speak for other employees. 309 NLRB No. 163, slip op. at 13.

[18] See, e.g., Yukon Manufacturing Co., 310 NLRB No. 42, ALJD slip op. at 25 (February 4, 1993); Research Federal Credit Union, 310 NLRB No. 13, ALJD slip op. at 18 (January 8, 1993); Homemaker Shops, 261 NLRB 441, 442 (1982); Clapper's Manufacturing, 186 NLRB 324, 332-334 (1970), enfd. 458 F.2d 414 (3d Cir. 1972); Han-Dee Spring & Mfg. Co., 132 NLRB 1542 (1961); Wahlgren Magnetics, 132 NLRB 1613 (1961).

[19] 309 NLRB No. 163, slip op. at 6.

[20] As noted above, the Region has concluded that the Employer's refusal to bargain with the Union as to the composition of the Committee unless and until agreement on a complete collective-bargaining agreement is reached violates Section 8(a)(5).

[21] Du Pont, 311 NLRB No. 88, ALJD slip op. at 16.

[22] Brown, 468 U.S. at 503. See, e.g., Belknap v. Hale, 463 U.S. 49 (1983) (state breach of contract action by striker replacements not preempted); Farmer v. Carpenters, 430 U.S. 290 (1977) (state tort remedies for intentional infliction of emotional distress not preempted).

[23] 468 U.S. at 503, citing Free v. Bland, 369 U.S. 663, 666 (1962).

[24] Although the Tennessee law provides that representatives "may be selected by their peers" where employees are organized, it does not require this and thus permits the alternative. Moreover, even if selection were made by the employees, this would not affect the other clearly sufficient indicia of Section 8(a)(2) and (5) violations.

[25] In this regard, see Electromation, Inc., 309 NLRB, slip op. at 3-4, citing I Legislative History of the National Labor Relations Act of 1935, 15-16 (GPO 1949). The Board there observed that Congress had considered the provisions outlawing company dominated labor organizations to be critical to the Wagner Act's purpose of eliminating industrial strife, since genuine collective bargaining could not take place without first abolishing these "sham" representational entities.

[26] See also Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) (federal minimum labor standards laws not preempted by NLRA).

[27] Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) (state may not penalize a concerted refusal to work overtime that was neither prohibited nor protected under the NLRA because Congress intended that the conduct be unregulated and controlled only by the free play of economic forces).

[28] Should the state institute action against the Employer for failure to comply with the state statute, there is recourse under the Act. See, e.g., NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

[29] NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938); Electromation, Inc., 309 NLRB No. 163, slip op. at 9; Yukon Manufacturing Co., 310 NLRB No. 42, ALJD slip op. at 50; Research Federal Credit Union, 310 NLRB No. 13, ALJD slip op. at 25; du Pont, 311 NLRB No. 88, slip op. at 5.

[30] 309 NLRB No. 163, slip op. at 7 fn. 27.